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United States Circuit Court of Appeals

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NINTH CIRCUIT.

NATIONAL SURETY COMPANY,
a corporation,
Plaintiff in Error.
vs
COUNTY OF LINCOLN,
Defendant in Error.

REPLY BRIEF OF DEFENDANT IN ERROR.

Upon Writ of Error to the United States District Court of the District of Montana

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Plaintiff in Error has filed three briefs—One on or about Oct. 1st—One on Oct. 18th and one on Oct. 21st. Hearing was had on Oct. 19th. The brief filed Oct. 18th is labeled "Reply Brief of Plaintiff in Error" but it was stipulated with the approval of the Court that the brief is in fact a Supplemental brief and would be treated as such.

In this brief we shall therefore refer to the brief of Oct. 18th as the "Supplemental Brief of the Plaintiff in Error."

We will take up first, the points urged in the reply brief of Oct. 21st and endeavor to discuss them in the order which plaintiff in error has arranged them, maintaining so far as possible the same numbering.

I

It is contended that the provisions of the Montana Code authorizing surety companies to do business in Montana have fixed the liabilities and privileges of such companies unalterably, so far as the Courts are concerned and that the distinction which many of the Courts have made between voluntary and compensated sureties cannot be applied in Montana, by reason of these provisions.

We cannot concede the soundness of this contention. In the first place, the distinction which the courts have made by which the rule of strict construction has been relaxed is not as between "Corporate" sureties and "individual" sureties but between "compensated" or "paid" sureties and voluntary sureties. While it is true, the cases, (so far as we have examined them) in which the distinction is made are cases in which one surety company or another were involved, the rule would be the

same were the defendant an individual surety, soliciting business in that line and signing bonds for a consideration, in other words—A professional bondsman. A distinction based on the mere fact that the surety in a given instance is a corporation would be intolerable and indefensible.

There is nothing then in Section I of the Act of March 10th quoted in defendant's reply to prevent the application of the rule that compensated sureties cannot invoke the rules of strict construction and that in such cases actual prejudice must be shown before the surety can claim a discharge by reason of changes in the contract.

But Counsel quote from Section III of the act as follows:

> "Such company may be released from its liability on a bond on the same terms and conditions as are by law prescribed for the release of individual sureties."

Here again Counsel fail to distinguish between the terms "release" and the terms "discharge" and "exoneration" of sureties.

What did the legislature mean by the words "such company may be *released* * * * on the same terms and conditions as are *by law prescribed* for the release of individual sureties?"

The answer to these questions is found in Sections 403-404-405-406- and 412 of the Montana Codes.

These provisions are as follows:

> "403. (1075). Release of Sureties.—Any Surety on the official bonds of a city, town, township, county or state officer, may be relieved from liability

thereon afterwards accruing, by complying with the provisions of the three sections following."

"404. (1076). Same.—Such surety must file with the judge, court, board, officer, or other person authorized by law to approve such official bond, a statement in writing setting forth the desire of the surety to be relieved from all liabilities thereon afterwards arising, and the reason therefor; which statement must be subscribed and verified by the affidavit of the party filing the same.

"506. (1078). Office declared vacant for want of official bond.—In ten days after the service of such notice, the judge, court, board, officer, or other person with whom the same is filed must make an order declaring such office vacant, and releasing such surety from all liability thereafter to arise on such official bond, and such office thereafter is in law vacant, and must be immediately filled by election or appointment, as provided for by law as in other cases of vacancy of such office, unless such officer has before that time given good and ample surety for the discharge of all of his official duties as required originally."

"412. To what bonds applicable.—The provisions of this Article as the same shall be in force after amendment by this Act, shall apply to all official bonds, and to bonds and undertakings of receivers, executors, administrators, and guardians, and to all bonds and undertakings required by law to be given and approved by any court, judge, board, person or body, and, except as to requirements of

> such approval the provisions shall apply to all bonds given or required by law to be given in attachment proceedings, criminal actions or proceedings, bail bonds, appeal bonds, and all bonds given in any legal proceedings or action in any court of this state. (Act approved March 7th, 1899.) (6th Sess. 81-82)."

The balance of paragraph "I" pp. 2-5 of defendant's reply brief is devoted to a discussion of the effect of alteration of or changes in the terms of the contract.

We insist that there were no changes in the *contract* and that the departure from the terms of the contract was a voluntary act on the part of the Coast Bridge Company for which we were in no wise responsible.

II

Under subdivision II counsel assumes that there is no proof in the record that the surety company has been indemnified and that the court cannot assume the fact merely by reason of our offer by proof.

Counsel misunderstands our position.

On page 116 of the record Mr. Magee, Asst. General Solicitor for the defendant surety company writes the firm of Logan & Child:

> "This company was merely surety on the bond in question, and, of course, must be governed by the instructions and directions of its *indemnitors* in all matters arising under it."

It is our contention that when the Assistant General Solicitor of the Insurance Company used the word "indemnitors," the word was used advisedly and according to its legal meaning. The legal meaning of the word is defined by Section 5648 of the Montana Code quoted at

length on page 29 of our brief in chief.

The proof then is that the Company was indemnified and in consequence is stripped of all defenses peculiar to suretyship and is before their court merely as a nominal defendant entitled to the benefit of only such defenses as would be available to the principal

Mr. Magee as the Assistant General Solicitor of the Company also advises us that the surety company "must be governed by the instructions and directions of its indemnitors."

In other words the company confesses that it is only a nominal party and that it has no control over its own actions with respect to matters arising in connection with the bond in question. Again it must be assumed that Mr. Magee in using the language quoted, did so advisedly and in view of the legal position, of the company as controlled by the laws relating to indemnity.

On page 30 of our brief in chief we quote in full subdivision 6 of Section 5654 of the Montana Codes.

This subdivision provides that if the person indemnifying is not allowed to control the defense, judgment against the surety is only presumptive evidence against the principal.

The position taken by Mr. Magee is conclusive proof that the Company was in fact indemnified.

A surety who has not been indemnified is permitted to control the defense of his own case without waiver or or loss of right to proceed against the principal. See Section 5655 Montana Codes quoted at length in our brief in chief on page 30.

We are not, as counsel seems to suppose, relying on

any presumption that might arise from the fact that they objected to our showing the *extent* of the indemnity.

In this connection we simply said in our brief in chief, "***having objected to the introduction of evidence on those two grounds and those alone, they would not now be permitted to contend that they were not in fact '*indemnified.*' "

It is to be remembered that the facts relating to the indemnity were peculiarly and exclusively within the knowledge of the surety company and when we produced the letter from Mr. Magee giving rise, to say the very least, of a very strong inference against the company, it was the duty of the company to rebut such inference if it was in its power to do so. The rule that evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, and of the other side to contradict, is applicable here.

Counsel quotes Section 5694 of the Montana Codes to the effect that a creditor is entitled to the benefit of everything which the surety has by way of security.

There is nothing in the section which conflicts with the other provision of our Code making an indemnified surety, in effect, a principal, nor is the remedy suggested by Section 5694 exclusive.

If the surety does not in the face of a threatened lawsuit see fit to surrender its security it cannot avoid liability as a principal under the terms of this section, and even did it surrender its security it would not thereby escape liability for any deficiency there might be after the security was exhausted.

III

WAS THE CONDITION REQUIRING THE APPROVAL OF THE WAR DEPARTMENT ONE TO BE PERFORMED BY THE COUNTY; OR WAS IT TO BE PERFORMED BY THE BRIDGE COMPANY?

Paragraphs three and four of the plaintiff's reply brief are devoted to a treatment of virtually the same subject and we will consider them as one.

In the first brief, that of October 1st, no pretense is made that a bridge erected without the approval of the Secretary of War would constitute a nuisance or unlawful structure, but in their reply brief this contention is urged with much earnestness.

Their present contention gives rise to the following questions:

a. Assuming that the clause requiring the approval of the Secretary of War is material for any purpose, does the performance of the clause amount to a condition precedent, or is the clause the subject of a plea in bar?

b. If it was a material condition was it to be performed by the county or by the bridge company?

c. In any event was the condition waived when the bridge company proceeded with the construction of the bridge and prosecuted the work until the completion thereof?

d. What presumption arises from the fact that the bridge company proceeded with the work—i. e. that approval was not secured, therefore all parties were acting unlawfully or that the approval was in fact secured and the parties were acting lawfully?

e. Is the court bound to presume, in the absence of

proof that a certain river is navigable water of the United States, or does the contrary presumption prevail?

f. Assuming that the river in question is navigable water of the United States, has a state the right to construct highway bridges over the same without the consent of Congress or the approval of the Secretary of War?

g. Does the record show that the United States ever took possession of the Kootenai river for the purpose of navigation or in any manner assumed control or jurisdiction over the same?

h. Was the general act of Congress relating to the construction of the bridge across navigable streams intended to apply to states acting as such; or was its application limited to those cases where the right to build had not theretofore been fully recognized by the Federal Government?

We submit that each of these questions must be answered adversely to the contention of plaintiff in error.

What is the proof with respect to the navigability of the stream and the assumption of control over it by the United States?

On page 9 of the reply brief of plaintiff in error the special Act of Congress of March 4, 1912, is set forth. This special act does not appear elsewhere in the record but we concede that the court may take judicial notice of its provisions.

On page 118 of the transcript on appeal is found the following recital.

> "No testimony was offered or introduced showing that the War Department of the United States ever approved the plans and specifications for said

> bridge, or granted permission for the construction of the same *and no evidence was offered or introduced by either of the parties touching the question of the navigability or non-navigability of the Kootenai river at the point where the Rexford bridge was constructed or elsewhere.''*

The only evidence then available to the court upon the question, is the bare fact that Congress passed a special act authorizing the construction of the bridge in question.

We submit that this is not sufficient to overcome the presumption that the Kootenai River is not navigable water of the United States; nor is it proof that the United States has taken over or attempted to take over control of the stream.

This question is set absolutely at rest by the decision of the Supreme Court of the United States in the case of Williamette Iron Bridge Co. vs. Hatch 125 U. S. 1-17, 31 L Ed. 629, hereinafter quoted at length.

It is urged by the plaintiff in error that the Courts will presume that congress acts, always within its constitutional powers.

We fully agree with counsel but inasmuch as that question is not even remotely involved in this case we cannot see where either the argument or the authorities cited in that connection are pertinent here.

It must be apparent that there is a wide difference between a case, as here, where the authority to construct the bridge is only incidentally involved and the line of cases cited by plaintiff in error in which the controversy was between persons asserting the right of navigation

and others claiming the right to maintain structures across confessedly navigable waters under special acts of Congress requiring the approval of the war department. It may be conceded that the right of navigation being general and the right to maintain the bridge being special, the burden of proof would be on the party asserting the special privilege or right.

Counsel also cites a line of decisions to the effect that the courts will not enforce an illegal contract and will take notice of such illegality even though there be no allegation to that effect.

We concede this also; but there is no pretense here that the contract in question was or is illegal or contrary to public policy.

Plaintiff in error cites the case of Oscanyon v. W. R. Arms Co. 103 U. S. 261. That case is typical of the line of cases cited in this connection and an examination of it shows how utterly inapplicable they are here.

In the case cited, a diplomatic officer of a foreign government entered into a contract with the Arms Co. to purchase a large number of rifles for his government with the understanding that he, personally was to receive a commission from the Arms Co..—In suit to recover the Court held the contract illegal, immoral and contrary to public policy.

By no stretch of imagination and by no process of reasoning can such cases be made applicable to the instant case—there is no pretense here that our contract or any part of it is or was illegal in any respect. It seems the parties went further than the law required and stipulated for the approval of the government of the

United States when such approval was not in any sense necessary.

NEITHER THE LAW NOR THE CONTRACT REQUIRED THE COUNTY TO SECURE THE APPROVAL OF THE WAR DEPARTMENT.

It might be conceded that it was the duty of the county to secure the passage of the Act of Congress, authorizing the construction of the bridge, provided, of course, that the Kootenai River at the point where the bridge was to be constructed was navigable water of the United States. We cannot concede for one moment that it would be in any event the duty of the county to secure the approval of the plans and specifications; whereas, in this case such plans and specifications were drawn by the Bridge Company, and the Bridge Company was to carry on the work of construction. But be that as it may, the facts are here established that the Bridge Company did in fact proceed with the construction of the bridge and carried on such work until it claimed a completion of the same; and that it received the contract price; and we are now asked to presume that the Bridge Company, as well as the county committed an unlawful act, which defendant says is a crime against the laws of the United States, and the court is asked to take official notice of the fact that such a crime was committed. In other words, they are trying to escape liability by reason of their own alleged wrongful act. And they further ask the court to go counter to all law which presumes that a public officer does his duty; that men are law abiding; and this presumption applies not only to the county commissioners, and the Coast Bridge Company, but to the

officers of the United States as well. If the Kootenai River was in fact a navigable stream, and the bridge in fact or in law constituted an obstruction, it is safe to assume that the officers of the United States would have performed their duty in the premises, and removed the obstruction, and instituted criminal proceedings in the proper court, and civil action for the recovery of the cost of removing the obstruction. There is no presumption that any stream constitutes navigable water of theUnited States, especially throughout its entire length; nor can such a presumption arise from the fact that in this case the county commissioners took the precaution to secure the passage of the Act of Congress. Such a course would naturally have been dictated by good judgment, regardless of the question whether the stream was or was not navigable waters of the United States. Under the laws of the State of Montana, the question of the navigability of a stream is one of fact, and the burden is upon the person asserting the navigability of such stream, to establish the same, except in those cases where Congress has declared streams to be navigable, or where the navigability of a particular stream at a particular point has been judicially determined by the courts of the United States; and there is a vast difference between the navigability of a stream under the laws of the United States, and under the various state laws. For instance, the test of navigability under the laws of Montana, is whether the stream is of sufficient depth and width to carry the products of the country, which might consist of sawlogs, shingles, lumber, etc. (Sec. 1326 R. C.). That is not the test applied under the laws of the United States,

and several courts have expressly held that although the stream be navigable for the purpose of transporting saw logs and other products of the country, it was not necessarily navigable within the meaning of the navigation laws of the Federal Government.

See Sec. 2476, Vol. 6, Fed. Stat. Ann., and notes.

It is urged that this court will take judicial notice of the rules and regulations of the principal departments of the government, and in the case of the Secretary of War, the permanent rules and regulations of the Department undoubtedly will be considered by the courts without proof, but it would be necessary of course, to identify the rule or regulation, and in any event, the court could not, and would not take judicial notice of how the ministerial and technical subordinate officers do their duty in a particular instance. In other words, this court in the absence of a showing cannot presume that the officers under the jurisdiction of the chief engineer of the War Department, did not examine and approve the plans and specifications for this particular bridge. But on the contrary the court is bound to presume that all proceedings were regular; that the commissioners did those things which the law and the contract required them to do, and that, likewise, the Bridge Company performed all of the formal acts required of them in the performance; and that the proper officers of the United States discharged their duties with reference to the subject in a proper manner; and that when the Coast Bridge Company commenced the construction of the bridge, they were not committing an act which would be a violation of the laws of the United States. The rules upon which these pre-

sumptions are predicated are so well established that it is not necessary to elaborate upon them, or call the court's attention to those provisions of the Laws of the State of Montana, which state in clear and precise terms the inference and conclusions, deductions and presumptions that may be drawn from certain conditions and states of fact.

The building of a bridge across the Kootenai River, was not an act involving moral turpitude, nor an offense at common law. That is, it was not *malum in se*, if wrong at all, which we deny. At most it was *malum prohibitum*, and if *malum prohibitum*, the facts which make it so must be pleaded, or at least established by evidence on the part of the party who relies upon it. Furthermore, the government alone could contest the right of either the Coast Bridge Company or the county of Lincoln to construct this bridge across a public stream. If the construction of such bridge was prohibited by the government the prohibition was not made for the benefit of this surety, or any private individual. The government itself is the only party who can raise the objection. But again, if as contended by the defendant, this court takes judicial notice of the detailed action of subordinate officers of the government, then this court knows that the permission referred to in the Act of Congress relating to the consruction of public bridges (34 Stat. at Large, 84), was obtained. The court further knows that the moving of this center pier was a mere mathematical calculation made necessary by the shifting of the bridge toward the eastern shore of the river, which would require no specific plans being drawn therefor. It appears from the

evidence that the only connection which the county had with reference to the moving of the pier is that Mr. Geary called the attention of the superintendent to the fact that it was the wish of the Bridge Company that the pier should be moved. The superintendent then wired the Bridge Company. The county gave no direction, but the Bridge Company did give the direction and instruction. The only authority the superintendent had for the moving of this pier emanated from the contractor, and if that removal was wrong, the company and its surety is responsible for that wrong.

If the separate and specific consent of the war Department to the moving of this pier was necessary, that consent could be given after his endorsement of the main plan and specification had been obtained, and there is not any evidence here to the effect that such consent was not given.

DOES THE CONSTRUCTION OF A BRIDGE WITHOUT THE AUTHORITY OF THE UNITED STATES CONSTITUTE A NUISANCE, *PER SE?*

In discussing this phase of the question, we must not lose sight of the fact that the bridge at Rexford was consructed not by private persons, but by the State of Montana. The Commissioners, in their dealings with highway matters, act only as the agents of the State. In order to give any weight to defendant's contention, the Court will have to indulge the presumption that the State of Montana erected a structure which amounted to a nuisance, and subjected it to the penalties provided by the laws of the United States, and the court will further

be bound to presume that the Kootenai river was, and is navigable water of the United States. The fact is that until the government takes possession of an inland stream, either by a specific act of Congress, or by the erection of public works and improvements, the presumption must prevail that it is not navigable water of the United States, but is wholly within the jurisdiction of the states through which it flows, and subject only to their control; and even in the case of navigable waters of the United States, there is a divided responsibility, as well as jurisdiction, and the government does not undertake to take over the entire control of the stream over which it has, (by reason of the interstate commerce clause) jurisdiction. The act of Congress requiring, in all cases where Congress by special act shall authorize the construction of a bridge, and requiring the plans and specifications to be submitted to the Secretary of War, for approval, was not intended to apply to those cases where the State, as such, undertook the construction of a bridge, in order to complete and make available and serviceable a public highway, but it was intended that if the state should construct such a bridge, and Congress thereafter took possession of the stream, it might under its paramount authority order and direct that alerations be made in the bridge, so as to permit of unobstructed navigation. The law was intended only for the control of private individuals and corporations. In any event, the nuisance, if nuisance it was, was a public and not a private nuisance, and could be abated only by the United States, or by the State of Montana, and as we have before suggested, it is to be presumed, that the United

States does not regard the bridge or pier in question as a nuisance, and certainly the State of Montana cannot raise the question, inasmuch as the State itself is responsible for the erection of the bridge by officers to whom it had delegated the power to act. We earnestly submit that in order to have availed themselves of the benefit of a defense based on the clause of the contract in question, it was necessary for the defendant to set it up as an affirmative defense, and allege among other things that the plans and specifications were not submitted to or approved by the War Department. That the Kootenai river at the point where the Rexford Bridge was constructed, was in fact navigable water of the United States, and that the United States had not by inaction tacitly or otherwise left all matters pertaining to the control of the stream to the State of Montana. Such a plea being interposed, the burden of proving it would have devolved upon the defendant, and we would be permitted to show under appropriate pleadings that the Bridge Company assumed the responsibility of obtaining the approval of the Secretary of War—that such approval was in fact, obtained—that the Kootenai River was and is not navigable, at the point where the Rexford bridge was constructed or elsewhere.

It is also to be noted that the Act of Congress does not make the mere failure to secure the approval of the plans and specification, a public offense. It does provide, however, that in the event the Secretary of War shall deem the structure an obstruction to navigation, he shall give notice to the persons responsible for its erection, to remove it within a specified time, and the failure

to remove, constitutes the offense. But even in this respect, the discretion of the Secretary is subject to the control of the Courts, and it cannot be arbitrarily exercised.

U. S. vs. Moline 82 Fed. Rep. 592. 21 Op. Atty. Gen. 430.

U. S. vs. Rider 10 Fed. Rep. 406. 20 Op Atty. Gen. 101.

In the case of Cummings vs. Chicago, 188 U. S. 430, the Supreme Court of the United States, says:

> "The decision in Lake Shore & M. S. R. vs Ohio was rendered before the passage of the river and harbor act of 1899. But the 10th section of that act, upon which the permit of the Secretary of War was based, is no so worded as to compel the conclusion that Congress intended, by that section to ignore altogether the wishes of Illinois in respect of structures in navigable waters that are wholly within its limits. We may assume that Congress was not unaware of the decision of the above case in 1897 and of the interpretation placed upon existing legislative enactments. If it had intended by the act of 1899 to assert the power to take under national control, for every purpose, and to the fullest possible extent, the erection of structures in the navigable waters of the United States that were wholly within the limits of the respective states, and to supersede entirely the authority which the states, in the absence of any action by Congress, have in such matters, such a radical departure from the previous policy of the government would have been manifest-

ed by clear and explicit language. In the absence of such language it should not be assumed that any such departure was intended."

Again in the same case at page 428 the court says:

"The Chicago river and its branches must, therefore, be deemed navigable waters of the United States, over which Congress under its commercial power may exercise control to the extent necessary to protect, preserve, and improve their free navigation. But the states have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people. This power embraces the construction of roads, canals, and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the states than by a distant authority. They are the first to see the importance of such means of internal communication, and are more deeply concerned than others in their wise management. Illinois is more immediately affected by the bridges over the Chicago river and its branches than any other states, and is more directly concerned for the prosperity of the city of Chicago, for the convenience and comfort of its inhabitants, and the growth of its commerce. And nowhere could construction, form, and strength, and the size of their draws, and the manner and times of using them, be better vested than with the state, or the authorities of the city upon whom it has devolved that duty. When its power is exercised so as to unneces-

sarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. If the power of the state and that of the Federal government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the Constitution to legislation in pursuance of it, as the supreme law of the land. But until Congress acts on the subject, the power of the state over bridges across its navigable streams is plenary. This doctrine has been recognized from the earliest period, and approved in repeated cases, the most notable of which are Wilson v. Black Bird Creek Marsh Co. 2 Pet. 245 7 L. ed. 412, decided in 1829, and Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96, decided in 1865."

"To the same effect is the recent decision in Lake Shore & M. S. R. Co. v. Ohio 165 U. S. 365, 366, 368, 41 L. ed 747, 748, 17 Sup. Ct. Rep. 357, See also Cardwell v. American River Bridge Co. 113 U. S. 205, 28 L. ed. 959, 5 Sup. Ct. Rep. 423, and Huse v. Glover, 119, U. S. 543, 30 L. ed 487, 7. Sup. Ct. Rep. 31 3."

The doctrine of Cummings vs. Chicago was approved and restated in the case of Montgomery vs. Portland 190 U. S. 104.

Reasoning in the abstract, it would seem logical that a stream is presumed to be wholly within the jurisdiction of, and under the control of the State and that where a right is predicated on the limited power of the Federal Government, the burden of alleging and proving that such right actually exists would be upon the person

asserting it. When the navigability of the stream as an interstate proposition, is once established, of course the power of the Federal Government is paramount. But, that has nothing to do with the question as to whether the stream is in fact navigable water of the United States, for its entire length, even though it may flow through two or more states. In the case of Morse vs. Home Ins. Co. 30 Wis. 496, 11 Amer. Reporter, 580, it was held that the Fox and Wolf rivers above Oshkosh in Wisconsin are not public waters of the United States and Mr. Farnham in his work on Waters and Water Rights Vol. 1 Page 68, says:

> "Whenever in its course, the stream ceases to be a public highway for commerce between states, its national character terminates, and above that point it is within the exclusive jursidiction of the state, and may be closed by dams and levees, and the same is true with respect to streams which are navigable only within the limits of the state."

On page 69 Vol. 1 of the same work, the author says:

> "The states having the right to obstruct the navigable rivers of the United States to some extent, until Congress assumes jurisdiction over them, the question arises: What is such assumption of jurisdiction?"
>
> "The mere proprietary right which the general government has in the streams is not sufficient to exclude state action. Among the first acts of Congress after the organization of the Federal government was the passage of an ordinance of the government of the territory northwest of the Ohio river,

is known as the ordinance of 1787. It provided that the navigable waters leading into the Mississippi and St. Lawrence rivers should be and remain common highways, forever free, without any tax, impost, or duty thereon. While the territory retains its territorial form of government this ordinance is operative to prevent the obstruction of the streams, but it ceases to have any operation when the states are admitted into the Union; unless its provisions are perpetuated by the states, as has been the case in some instances. Before it was established that the ordinance was superseded there was much discussion as to its force; but it was generally conceded that it did not prevent the bridging of streams, or such obstruction as tended to the improvement of the navigation. The acts admitting the various states into the Union have, in most cases, contained provisions similar to those in the ordinance of 1787; but these provisions do not assume such jurisdiction on the part of Congress over the streams as entirely to prevent obstructions by the states. The granting of coasting licenses by the United States does not confer rights which will prevent the states from obstructing streams; nor does the appropriation of funds for the improvement of the streams. To preclude actions by the states there must, therefore, be something in the nature of direct legislation on the part of Congress, or a clear indication of intention to assume the jurisdiction, although much of the legislation dealing with the navigable waters has been of such a character as to indicate such intent. It has

been held that the provisions of the act of September 19, 1890, which forbade the erection of structures which would obstruct waters of the United States, was not intended to be retroactive, or to affect existing structures. When Congress refers to inland waters in statutes creating rights or giving actions on such matters, it includes a sound lying wholly within a state."

Assuming that the Kootenai river is navigable at Rexford, and also assuming that the plans and specifications were not approved by the Secretary of War, it does not follow that the bridge is a nuisance. In the case of Iverson vs. Dilno the Supreme Court of Montana says:

> "Any right asserted to the use of the public highway must be understood to be limited (a) By the extent of the use; (b) By the character of the use; (c) By the right of others to use the same highway and possibly by other considerations."

And again, in the same case, the Court says:

> "The annoyance, interferance or injury, must, however be a substantial one, as distinguished from a mere technical violation of plaintiff's rights. '*De minimis non curat lex.*'"
>
> Iverson v. Dilno, 44 Mont. 270.

It will not do to say that when Congress passed the Act of March 4, 1912, authorizing the construction of the bridge, it thereby intended to or did assume jurisdiction over the Kootenai river. It was the most natural thing in the world for the County, as well as the Bridge Company, to provide against future contingencies and conditions by securing in advance the consent of Congress

to construct the bridge, and it was the most natural thing in the world for Congress to grant such permission regardless of whether the stream was or was not, in fact, navigable water of the United States, and regardless of the question whether Congress regarded the stream as navigable. The giving of the consent of Congress was a perfunctory matter, and the asking of such consent was an act of prudence, so that in the event the government should thereafter take over the control of the stream, the State would be protected in its occupancy, and furthermore it was an act of prudence on the part of the State to secure such permission to the end that if after the work of construction should be commenced, the War Department, should through its various agencies take the position that the stream was navigable water of the United States, and commence proceedings to enjoin construction of the bridge. But these are all matters of prudence and expediency, which, while they would influence the minds of public officers about to expend a large sum of money upon public improvements, do not change the fact that the Kootenai river at the point indicated, was not, and is not navigable water of the United States; nor does it change the rule regarding the individual or person who asserts a right, based upon the navigability of a stream, to plead and prove such navigability. To begin with, the State of Montana is the owner of the bed of the stream, and has jurisdiction and control of both banks, subject only to the proprietory right of those individuals, if any, who may own the banks, and subject, of course, to the paramount right of the United States to declare the stream navigable. This doctrine is clearly laid down in

the case of Scott vs. Lalley, 33 Supreme Court Reporter, 242 holding that the State of Idaho is the owner of the bed of Snake River. This is the rule recognized from the time of the establishment of the government, and in this respect all new states are admitted into the Union under the same terms as the original states.

In the case of Mauldin vs. Central of Georgia Railway Company, 61 Southern Reporter, 947, the Supreme Court of Alabama, quoting from the decision in the case of Gilman vs. Philadelphia, 3 Wall. 713, 18 L. Ed. 96, says:

> "It is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided. * * * The national government possesses no powers but such as have been delegated to it. The states have all but such as they have surrendered. The power to authorize the building of bridges is not to be found in the federal Constitution. It has not been taken from the states. It must reside somewhere. They had it before the Constitution was adopted, and they have it still. 'When the Revolution took place the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soil under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government.' "

And again quoting from the same decision by the Supreme Court of the United States, the Supreme Court of Alabama says:

> "It must not be forgotten that bridges, which are

connecting parts of turnpikes, streets, and railroads, are means of commercial transportation, as well as navigable waters, and that the commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs. It is for the municipal power to weigh the considerations which belong to the subject, and to decide which shall be preferred, and how far either shall be made subservient to the other. The states have always exercised this power, and from the nature and objects of the two systems of government they must always continue to exercise it, subject, however, in all cases, to the paramount authority of Congress, whenever the power of the states shall be exerted within the sphere of the commercial power which belongs to the nation. The states may exercise concurrent or independent power in all cases but three'':

"(1). Where the power is lodged exclusively in the federal Constitution.''

"(2) Where it is given to the United States and prohibited to the states.''

"(3). Where, from the nature and subjects of the power, it must necessarily be exercised by the national government exclusively.''

Quoting from the decision of the Supreme Court of the United States in the case of Cardwell vs. Bridge Company, 113 U. S. 210, 28 L. Ed. 959, the Supreme Court of Alabama in the case above referred to, says:

"When Congress acts directly with reference to the bridges authorized by the state, its will must

control so far as may be necessary to secure the free navigation of the streams. In Wilson v. Blackbird Creek Marsh Co., 2 Pet. 245 (7 L. Ed. 412), a dam had been constructed across a small navigable river in the state of Delaware, by authority of its Legislature; and this court held that the obstruction which it caused to the navigation of the stream was an affair between the government of the state and its citizens, in the absence of any law of Congress on the subject."

In the case of Sumner Lumber and Shingle Company vs. Pacific Coast Power Company, 131 Pac. 220, the Supreme Court of Washington, says:

"The navigability of streams, or that they possess a capacity for valuable floatage, is a question of fact, and he who asserts it must prove it. To be navigable or floatable in law, the stream must possess such characteristic in its natural state. If artificial means or aids are necessary in making use of the stream to float timber, the stream is not floatable."

* * * * * * * * * * * *

"When a stream claimed to be navigable is not meandered nor declared navigable by the Legislature, it is presumed to be non-navigable, and the burden is upon the party claiming it to be navigable to show that it is so in fact."

Bissel v. Olson, 143 N. W. 340 (N.D.)

In the case of State ex rel Foster vs. Ritch, 49 Mont. 155, the Supreme Court held that a bridge is not County property, and that high-ways, and the bridge is a part of

a high-way, belongs to the public, and it follows that when a bridge is erected as a part of a public road by a Board of County Commissioners, those officers are acting only as a governmental agency of the State.

See also Bonnerville County vs. Bingham County "Ida." 132, Pac. 431. also State ex rel Donlan vs. Board, 49 Mont. 517.

As already shown, the Congress and courts of the United States have from the very beginning recognized the rights of the States to construct bridges, even upon navigable streams over which the government had assumed jurisdiction, and control, and in the protection of this right, the Federal courts have been just as jealous as the State courts, and it would be new doctrine now to assert that the state having a sovereign exercising this recognized right could be charged with creating or maintaining a public or private nuisance, and that the exercis of the power, standing alone, amounts to a nuisance, or in other words, a bridge erected by the State is a nuisance, per se, or the construction of a bridge by a state is a *prima facie,* unlawful.

We apprehend that notwithstanding the Act of Congress of 1906, such a doctrine will find no countenance in the courts, state or federal of this country. It is clear that the act of 1906 was never intended to apply to bridges constructed by a sovereign State acting directly as such, as is the case here.

Section 1 of the Act provides:

"That when, *hereafter,* authority is granted by Congress to any *persons* (italicising ours) to construct and maintain a bridge across or over any of

the *navigable waters of the United States,*'' etc. (italicising ours).

1. What did Congress have in mind in using the term ''*persons*''*?* As we shall show hereafter neither the state nor the United States is a *person* and:

2. What was meant by the words: ''*When hereafter authority is granted, etc?*'' and

3. What was meant by the use of the words, ''*navigable waters of the United States?*''

When Congress used the term ''When, hereafter, authority is granted, etc.'' it clearly meant to embrace only those classes of cases where it was necessary to have a special act of Congress in order to confer the authority to build the bridge, and related not to rights existing at the time of the passage of the act. As we have heretofore suggested, the right of a state to construct bridges across navigable and non-navigable streams has always been recognized by Congress and by the Federal courts, and therefore it could not under any possible condition have been contemplated by Congress that the Act of 1906 should be applied in cases whereby states under their sovereign, established and recognized powers undertook the construction of bridges, even over navigable waters of the United States the law was intended clearly to apply to those cases where individuals or corporations not exercising powers belonging to the state should thereafter undertake to construct a bridge. As was suggested by the Supreme Court of the United States in the case of Cummings vs. Chicago, 188 U. S. 430, in construing an earlier enactment. Congress at the time of the passage of this act must have known of the doctrine laid down re-

peatedly by the Supreme Court touching this right of the State to construct bridges, for the benefit of the public and in the interest of commerce, interstate and intrastate. By the term "navigable waters of the United States," of course Congress must have meant waters that are in fact navigable waters of the United States and not waters which might hereafter be taken over and controlled by the federal government. The interpretation here contended is also borne out by the subsequent sections of the Act.

Section 2 provides that any bridge constructed under the provisions of this Act shall be a lawful structure and shall be recognized and known as a post route upon which no higher charges shall be made for the transmission over the same of the mails, troops and munitions of war of the United States States are not in the business of establishing toll bridges or toll roads, and when it constructs a bridge it is for the use of the public, and there can be no snch thing as a charge to the individual using it

Section 3 gives railroad companies desiring the use of any railroad bridge built under the provisions of this Act, equal rights and privileges relating to the passage of railroad trains or cars over the same.

Section 5 provides a penalty for refusal or failure to comply with the orders of the Secretary of War in regard to the construction or maintenance of the bridge. Certainly no fine could be imposed on the State of Montana.

Section 6 provides that if no time is fixed in the special act for the commencement and completion of the bridge, work shall be comenced within one year and completed within three years from the date of the passage of the act.

Section 7 provides that the word "persons" as used in

the Act shall be construed to import both the singular and plural and shall include "municipalities," "quasi municipalities," "corporations," "companies" and "associations." The maxim "*expressio unis alterus est*" is applicable to this last Section, and surely if Congress intended to take from the States the general right to construct bridges and make such right dependent upon a special act of Congress in each case, it would have said so in plain and direct terms, and not left it to the courts to take away such power by a strained construction of the law.

If we clearly understand the decision of the highest court of the land upon this subject, this power on the part of the State was existent before the adoption of the Federal constitution, and is one of which it should not lightly or without clear and unmistakable authority be deprived; and there is no difference in this respect between the State of Virginia and the State of Montana. The new states have all been admitted into the union under the same terms as the original thirteen states, and there is not one line in the enabling act admitting Montana into the union which impairs its powers in this respect, nor is there one line in the constitution of the State or of the ordinances adopted in connection with it which surrenders this right. Of course, it might be urged that the term "municipal corporation" and the term "quasi municipal corporation" as used in Section 7 bring counties within the purview of the act, but as a matter of law and fact a Montana County is not even a quasi municipal corporation. The supreme Court, it is true, speaks of it as a sort of "quasi municipal corporation," but the words are used merely in a general descriptive way. The fact is, that a Montana

county is purely and simply a governmental agency of the State, having no power except to build and construct roads, as the agent of the State, to care for the poor, as such agents to provide facilities for holding court, making assessments and providing for the housing and keeping of public records, transfers of property, etc. They have no power to own or control real or personal property. They have no power to engage in business of any kind even to the extent of furnishing the inhabitants of the County with light and water or doing or performing any of the functions of a municipal corporation or a quasi municipal corporation as it is generally understood. Even if the counties were intended to be included in the definition still the statute would not apply to counties constructing bridges under direct authority of the State, as in that case it would not be necessary for Congress to authorized such work by special act. As it necessarily follows from the power reserved to the State that it may delegate the power to the several counties. But a county in the construction of a bridge does not act under delegated powers as a private corporation does when it exercises the power of eminent domain, but it acts directly as the agent of the State, just as the laborers upon the bridge would act if they were employed directly by the officers of the State or by the legislative assembly.

The case of Missouri vs. Illinois, 200 U. S. 5, (The Chicago Drainage case) observes the distinction between acts committed by individuals and acts done by a State, as amounting to or constituting a nuisance. The following excerpts from the decision by Mr. Justice Holmes are in point.

"It may be imagined that a nuisance might be created by a State upon a navigable river like the Danube, which would amount to a *casus belli* for a State lower down, unless removed. If such a nuisance were created by a State upon the Mississippi, the controversy would be resolved by the more peaceful means of a suit in this court. *But it does not follow that every matter which would warrant a resort to equity by one citizen against another in the same jurisdiction equally would warrant an interference by this court with the action of a State.*" *(Italics ours).*

And again the Court says:

"Before this court ought to intervene the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side."

"Subject to limitations existing or imposed in relation to navigable waters of federal or State constitutions or by federal laws and until the power of Congress over navigable waters and to regulate commerce is called into action, a State has power to authorize the erection, construction and maintenance of bridges over navigable waters within the State. * * * * * * * *."

Joyce on the Law of Nuisances, Sec. 274.

"That a State has power to authorize the building of bridges over navigable waters, although they may to a certain extent obstruct navigation, is a well

established doctrine. This power, however, is held to be subject to the exercise of the power of Congress to regulate navigation."

2 Amer. & Eng. Ency. of Law, Page 546.

In the Wheeling Bridge case, Pennsylvania vs. Wheeling and Belmont Bridge Company, 13 Howard (U. S.) 518. 14 L. Ed. 249; 18 Howard (U. S.) 421, 15 L. Ed. 435, Mr. Justice Holmes said:

"In the case at bar, whether Congress could act or not, there is no suggestion that it has forbidden the action of." the State. 16.

See page 348, Joyce.

Mr. Joyce, in his work on nuisances at page 349, Section 274, says:

"But it is held that a bridge over a navigable stream is not indictable as a nuisance where it is erected for a public purpose, leaves a reasonable space for the passage of vessels and produces a public benefit."

Quotation citing Miss. & Mc. R. R. Co. vs. Word, 2 Black (U. S.) 485.

The Supreme Court of the United States makes short work of this question in the case of Iring vs. Ives, 222 U. S. 235, 56 L. Ed. 364. In that case a marine railroad projected its line of road beyond the harbor line established by the Secretary of War conformably to the Act of March 3, 1899, 30 Stat. et L. 1151, Chap. 425 U. S. Compiled Statutes, 1901. The plaintiff in error negligently suffered his vessel to collide with the structure and was thereupon sued for damages. A judgment was rendered against him and he finally reached the Supreme Court

of the United States on writ of error. It is to be noted in connection with this case that the Secretary of War was given authority to establish hargor lines and also provided that whenever any, "bridge, dam, dyke or causeway over or in any port, roadstead, haven, harbor" etc. should be contemplated, the plans of such structure should be submitted to the Secretary and approval of that official obtained.

6. Fed. Stat. Anno. 805.

The court, by Mr. Chief Justice White, says:

> "The basis of the assumed Federal right rests upon the plainly erroneous assumption that the act of 1899 was intended to or did operate to paralyze all state power concerning structures of every character in navigable waters within their borders, and to destroy automatically all vested rights of property in such works, even although acquired prior to the act of 1899, under the sanction of state authority. Cummings v. Chicago, 188 U. S. 410, 47 L. Ed. 525, 23 Sup. Ct. Rep. 472. See also Lake Shore & M. S. R. Co. v. Ohio, 165, U. S. 365, 41 L. ed. 747, 17 Sup. Ct. Rep. 357. In view of the character of the case, the facts found by the court below, and the absolute want of merit in the Federal question relied upon, we are of opinion that the grounds relied upon for review are of so frivolous a nature as not to afford the basis for the exercise of jurisdiction, and our decree therefore will be, Dismissed for want of jurisdiction."

Upon the question of the effect of the special Act of Congress authorizing the construction of the bridge at

Rexford, as an assumption of Federal control, the attention of the court is invited to the decision of the Supreme Court in the case of Williamette Iron Bridge Company vs. Hatch, 125 U. S. 1-17 31 L. Ed. 629. In that case it was contended in support of the Federal jurisdiction, first: support of the Federal jurisdiction, first:

> That the Act of Congress admitting Oregon into the union contained this clause, "That all the navigable waters of the state shall be common highways and forever free to all citizens of the United States," without any tax, duty, impost, or toll therefor.
>
> 2. That Congress had established a port of entry at the City of Portland in the Williamette River, and had required vessels which navigated it, to be enrolled and licensed therefor.
>
> 3. That Congress had frequently directed the improvement of the navigation of the river and appropriated money therefor.
>
> 4. *That Congress had, by an act approved February 2, 1870, giving consent to the erection of another bridge across said river from Portland to East Portland, asserted the powers of the United States to regulate commerce upon the river and to prevent obstruction to the navigation of the same, and in the act declared, "But until the Secretary of War approves the plan and location of said bridge and notifies the said corporation, association, or company of the same, the bridge shall not be built or commenced."*

The court disposes of the provision of the enabling

act by saying that the provisions thereof did not relate to physical obstructions of the river, but to the political phases of the question only. *The court further found that with regard to the Williamette River three acts of Congres had been passed authorizing the construction of the bridges thereon.* One at Portland, one across the river at Salem, one which authorized the Oregon, California Railway Company to build a bridge at Portland. The first act gave the authority to the City of Portland. The second act gave the authority to the County Commissioners of Marion County, and third act gave the authority, as before suggested to a railroad company. With reference to these acts, the court says:

> *"These Acts are special in their character, and do not involve the assumption by Congress of general police power over the river." (Italics ours).*

Touching the contention that in consequence of having expended money in the improvement of the river and in making Portland a port of entry, the court says:

> "The argument of the appellees, that Congress must be deemed to have assumed police power over the Williamette River in consequence of having expended money in improving its navigation, and of having made Portland a port of entry, is not well founded. Such acts are not sufficient to establish the police power of the United States over the navigable streams to which they relate."

See also United States vs. Bellingham Bay Boom Company, 26 C. C. A. 547.

IS A STATE AS SUCH, EMBRACED IN THE TERM "PERSON" AS USED IN THE FEDERAL STATUTE OF 1906 RELATING TO THE CONSTRUCTION OF BRIDGES ACROSS NAVIGABLE WATERS?

In determining this question, a clear distinction must be observed, viz: A state may act in its sovereign capacity and it may also act in its capacity as a proprietor. In the latter capacity, it has been regarded as a person—for instance under the Federal laws requiring the payment of excise tax on the sale of intoxicating liquors, states having dispensory laws and engaged in the sale of intoxicating liquors are deemed to be persons within the meaning of the law, requiring the payment of the tax, but it is not always, even where the government is acting in its proprietory capacity, that it is treated or regarded in law as a person; for instance—the Supreme Court of the United States held that the United States was not a "person" as used in a statute providing that a devise may be made to any person capable by law of holding real estate.

See United States vs. Fox, 94, U. S. 315.

The term "person" as used in the acts of Congress, touching internal revenue, does not include a state.

United States vs. Baltimore & O. R. Co. 84, U. S. 322.

In State vs. Brown, 10 Ark. 104, 107, it was held that the state is not to be included within the statute in reference to prosecutions for trespass on *persons* or property.

In the case of West Coast Manufacturing and Investment Company vs. West Coast Improvement Company,

66 Pac. 97-103, 25 Wash. 627, 62 L. R. A. 763, it was held that "person" in its ordinary legal significance does not embrace a State or Government.

In In Attorney General vs. Sullivan, 40 N. E. 843, 163, Mass. 446, it was held that information in the nature of *quo warranto,* filed by the Attorney General in the Supreme Judicial Court, to test one's right to a public office, is not a controversy

"between two or more persons"

within the meaning of the declaration of rights, securing the right of trial by jury.

In the case of McBride vs. Pierce County Commissioners, (U. S.) 44 Fed. 17, 18, it was held that a State is not a "person" within the ordinary or legal definition of that word.

In the case of Butler vs. Merritt, 38 S. E. 751, 752, 113 Ga. 238, it was held that a law making it unlawful for any person to sell intoxicating liquor did not apply to the state.

In the case of State vs. Harmon, 50 S. E. 828, 830, 57 W. Va. 447, it was held that a code provision requiring the owner of property sold for taxes to tender to the claimant of the tax title the taxes and interest required to be refunded, relates to persons, and does not apply to the state.

In the case of Fowler vs. Rome Dispensary 62 S. E. 660, 663, 5. Ga. App. 36, it was held that dispensary commissioners are officers of the State and not sueable as such under the code provisions giving a parent a right of action against any person selling spiritous liquor to his minor son.

In Osterhoudt vs. Keith, 117, N. Y. Supp. 809, 810, App. Div. 83, it was held that the State was neither a person nor a corporation nor a municipal corporation.

> The United States if not a "person within the meaning of the Bankr. Act. of July 1, 1898 c. 541, 30 Stat. 563, Title Guaranty and Surety Company vs. Guaranty Title and Trust Company 174 Fed. 385, 387, 98 C. C. A. 603.

V.

Under subdivision V of their brief counsel, in order to make the facts fit their theory of the law, have carried argument to a point where the disposition to discuss the question in a serious vein is taxed to the utmost limit.

It is there gravely contended that although the bridge company voluntarily departed from the plans and specifications and erected a bridge differing (as they claim) materially from that called for in the plans, the county by reason of its acceptance made a new contract and thereby discharged the sureties.

This is carrying the doctrine that sureties are favorites of the law to an extent unheard of before in any court.

If counsel's theory is correct it became and was the duty of the county upon completion of the bridge to refuse acceptance and commence suit against the sureties for such damage as it might have sustained by reason of the departure from the plans and specifications or be barred from holding such surety for any damage which might thereafter result from undiscovered or unknown defects.

The sureties contract was that the bridge company

would construct the bridge "strictly according to the plans and specifications" and they cannot complain because the county waived its right to the departure in question, if there was in fact a departure.

There was not any sense in the making of a new contract nor an alteration of an existing one.

It must be remembered that we are not suing to recover damages sustained by reason of an apparent defect or or one reasonably discoverable—but on the contrary one not known and not discoverable until after the collapse of the bridge.

There was and could be no ratification of any contract made by Commissioner Garey for the reason that the commissioner did not attempt to make any contract and his knowledge is not imputable to the board as a whole.

> Smith v. Zimmer, 45 Mont. (On rehearing) at P. 395.
>
> A contract not valid or binding which attempts to modify or alter the original contract does not discharge the surety.
>
> Gordon v. Second National Bank, 144 U. S. 97.
>
> See also Section 5674 , Montana Codes, which which reads as follows: "A promise by a creditor which for any cause is void, or voidable by him at his option, does not alter the obligation or suspend or impair the remedy within the meaning of the last Section."

VI.

Under subdivision VI. counsel seek to shift the responsibility for the failure to sink the center pier to a solid foundation from the shoulders of the Bridge Com-

pany to that of the County.

In order to make any headway on this point counsel assumed certain things to be established by the evidence which are not in fact so established and in proof of which little, if any evidence appears in the record.

It is urged that if the concrete pier had been carried to the proper depth the bridge would not have collapsed and that the County's engineer, if competent, would have directed the placing of the pier at the proper depth in the bed of the stream.

See Reply Brief, P. 23.

This assumes, as a matter of fact, that the construction of the pier in the manner indicated would have avoided the collapse and assumes as a matter of law *a.* that the board had a right to employ the so-called county engineer in the capacity of superintendent of bridge construction, and *b.* it was its duty to do so.

None of these contentions are tenable.

As to the fact assumed—the only testimony in support of it is found on page 104 of the record. There Mr. Raynor, on behalf of the plaintiff in error, testified that if he had had his way he would not have used piles in the center pier but "would have carried the concrete down lower."

He does not say that in such event the bridge would have collapsed nor does he say that the bridge would have been more stable or secure. He does not say that he was prevented from having his way by any official of the County. He was in Portland most of the time during the course of construction and the Company had another superintendent in charge of the work. If Mr. Raynor was

prevented from having his way it must have been on account of a disagreement between him and the officials or employees of the Bridge Company.

[In our Brief in Chief; (P. 53) we made the same mistake as to what the record really shows in this respect as counsel for the plaintiff has made in the several briefs filed by him. Our mistake was due to the fact that in our hurry to prepare and print the brief in time for the hearing we were compelled to use portions of the brief submitted to the trial court and reference was had to the record as it appeared in that court.

See also decision of trial court. Bot. P. 123]

The omission from the transcript of all the evidence on this point and that relating to the matter of driving the piles to refusal, as well as the failure to assign the ruling of the court in this respect as error, ought to be sufficient to warrant the court in refusing to consider the question.

As a mater of fact Mr. Raynor did have his way as will be shown by an examination of the record.

We assume that the original plans have been filed in this court as exhibits, and if the court will examine the plan as to the depth of proposed excavation and will compare the plan with the testimony of Mr. McClayn that the excavation was made to a depth of eight feet six inches (Record P. 106) it will be seen that the plans were disregarded, as far as the depth of the excavation was concerned.

And this also disposes of the contention that the depth of the excavation was under the control of the County as it evidences the interpretation put on the contract by the parties themselves. There is no pretense that the County

ordered this additional excavation or even had knowledge of it, and the bridge company in pursuance of its undisputed right in the premises carried the excavation down to the point indicated by Mr. McClayne's testimony.

Nor can the language of the clause quoted on page 17 of their reply brief justify the claim that the County had control of the extent of the excavation or the amount of concrete to be used.

The clause provides that the County has the option of *deducting* from the amount of the concrete and this is the limit of the County's authority. On the other hand the bridge company agrees to "furnish and construct in place any additional concrete *required in said pier* below water level" the contract is not to construct in place any additional concrete *required by the County,* but additional concrete required *in the pier,* and inasmuch as the company undertook to build "a perfect bridge" the privilege of using such amount of concrete as might be necessary to that end was of necessity left to it.

As to the assumption that it was the duty of the board to supervise, or have the County engineer supervise, the construction of the bridge, that contention is equally untenable.

On pages 43 and 44 of our brief in chief we call attention to the provision of Section 1413 and 1414 of the Montana Codes.

These sections absolutely limit the power of the board with respect to the construction of bridges and confer no authority to supervise. The board, after a bridge has been completed, may send one of its members to make inspection, and there its authority ends.

The words "inspection" and "supervision" are not synonymous, and as suggested in our brief in chief the courts of Montana have always limited the powers of the board practically to the letter of the statute.

But counsel contends that under the act of March 11th, 1909, the county surveyor is given general charge and supervision of the work.

The act of March 11th, 1916, is not available here.

The Rexford bridge was not a part of "*a main highway*" within the meaning of the statute under consideration.

The act in question is a law relating entirely to main highways to be constructed in pursuance of special provisions upon petition of abutting owners largely at the expense of such owners. It has no reference to the general highway law of the state under which the Rexford bridge and its approaches were constructed.

In other words the Rexford bridge is not on "a main highway" but the bridge and the highway upon which it is located was built with the proceeds of a bond sale and as before suggested, under the general law of the state.

Counsel cites the provision of Section 1387 and 1389 Montana Codes.

We have had occasion to refer to these provisions elsewhere and it is to be noted that they impose a limitation not only on the power of the board to inspect (not supervise), *but upon the county surveyor also,* and Section 1388 of the same Code limits the compensation of the board member and surveyor to "inspection."

But counsel further contends that the *contract* requires the board to supervise the construction of the

bridge. Nowhere in any of the briefs filed by them do they point to a single paragraph which imposes such duty and we will content ourselves with the assertion there is no such provision to be found anywhere in the record.

For the reasons herein given the authorities cited under the sixth subdivision of the reply brief are not in point here.

The bridge company undertook to build a bridge according to certain specifications; the surety promised that the bridge company would carry out and perform its contract; the bridge company did not drive the piling in accordance with the specifications, by reason whereof the bridge collapsed.

It seems to us the issue is a simple one and the logic of the trial court unassailable.

VII.

Under paragraph VII. of the reply brief the case of *Blackburn v. Morel* is cited to sustain the contention that the clause in the contract authorizing changes is not broad enough to warrant the departure from the terms of the latter with respect to payments.

In their various briefs they have cited a number of cases to sustain their view but it is pertinent here to say that none of them including the Blackburn v. Morel case are in point. Quoting from p. 24 of the reply brief we find the following extract from the decision in the case referred to:

> "The fact that the contract provided for change and alterations in the *plans* of the building has no bearing," etc.

The vital difference between that case, and all the oth-

ers cited, and the case at bar is this—In the cases cited authority to make changes was limited to the "*plans*" or "plans and specifications" while in the case at bar authority is conferred to deviate from the "*contract*" as well as to order alterations, additions or omissions from the *contract,* plans and specifications.

But even if the authority conferred by the clause in question were not broad enough to warrant the departure from the terms of the contract the question is set at rest by the decision in the case of Dodd v. Vocovich, 38 Mont. 188.

Under the rule laid down in that case, no change in the terms of contract will release the surety, unless such change results to the detriment of the surety, and the only change in this contract which could have resulted to the detriment of the surety, so far as the time of payment of the contract price is concerned, would be with reference to the condition of the bond, which guarantees that the contractor will pay for all the material and labor —and of course, if the payments had been prematurely made, and the contractor had failed to pay for his material or labor, and liens were filed against the bridge as a result; or individuals for whose benefit that clause was inserted in the contract, had commenced suits against the surety company to recover for wages or material, then it might be contended that the change as to payments resulted to the damage or detriment of the surety, but not otherwise, because there is nothing in the bond nor in the contract which in any way limits the county in making payment, or the Bridge Company receiving payments. This is the rule laid down by Brant in his work

on suretyship and guaranty, and the rule is there clearly stated that premature payments release the surety only where surety is prejudiced by reason of having to pay the debt of the principal.

See 2 Brant on Suretyship & Guaranty, 750 (3 Ed)

As to what changes are deemed material, see:

23 Howard, 150;

Harper v. National Life Co., 56 Fed. 281;

Finley v. Bullard, 78 Fed., 866;

Guaranty Co. v. Press Brick Co. 191 U. S., 416.

In our brief in chief, we invited the attention of the court to the provisions of the Montana Codes relating to the exoneration of guarantors but inadvertently omitted reference to the provisions relating to sureties.

Inasmuch as the contract, plans, specifications and bond constitute but one contract by the terms of which both the construction company and the surety company are bound, the relation is that of principal and surety.

The provisions of the statute peculiarly applicable here are found in section 5686 and are as follows:

"Surety is exonerated:

"1. In like manner with a guarantor.

"2. To the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his rights, or which lessens his surety or

"3. to the extent to which he is prejudiced by an omission of the creditor to do anything, when required by the surety, which it is his duty to do."

Here is a legislative modification of the doctrine that sureties are favorites of the law and an application of

the modern doctrine that before a surety claim a discharge by reason of changes in the terms of the contract he must show injury.

Dodd v. Vocovich, 38 Mont. 188.

VIII.

In paragraph VIII of their reply brief counsel argues that plaintiff's case fails because of the fact that payments were not made according to the contract.

This of course is on the theory that there was a *variance*—but under the practice of this state a *variance* is not fatal unless the adverse party is misled to his prejudice; and timely objection must be made.

In this case the defendant not only suffered our proof of payment to go in without objection but supplemented it with the vouchers, showing that county warrants had been issned in payment and at no time was the attention of the trial court called to the so-called variance.

We submit, of course, that there was in fact no variance but even if there was it is too late to urge it now.

Kalispell Liquor & Tobacco Co. vs. McGovern 33 Mont. 394.

X

In paragraph X counsel insist that the question of the approval by the War Department or want of approval was interposed in time.

The complaint shows that the parties acted on the contract and proceeded with the construction of the bridge.

If under any view of the case the clause in question was a material one it was the subject of a *plea in bar and should have been set up in the answer.*

AS TO THE "SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR."

The brief referred to is for the most part devoted to a restatement of the argument contained in their brief in chief and in their reply brief and we will not attempt to answer in detail the arguments there advanced. For the most part the points attempted to be made in the brief in question have been answered herein and in our brief in chief. A line of reasoning characteristic of the entire brief found on page 68 and we will indulge in a few brief comments thereon.

On the page referred to after quoting from the decision of the trial court on the subject of the driving of the piles, they say:

> "For, as the court says in its opinion, it was mere conjecture as to whether the bridge would have fallen away if the required piling had been used in the required manner."

If the finding of the court had been as counsel interpret it, the judgment would have been for defendant and not for plaintiff.

Throughout all of their briefs counsel have sought to put strained and unwarranted constructions on the facts and law to make them fit their theory of the case but this is the first and only attempt to take such liberties with the decision of the trial court.

What the court really did say was that,

> "*Counsel's theory* that the bridge might have collapsed had the piles been driven to whatever unknown depth *was 'mere conjecture' and not permissable.*"

See Record p. 123.

It is to be noted that the last three words ("and not permissable") are omitted from counsel's quotation of the sentence as found on page 68 of the brief in question.

In all of their briefs counsel assert that we are not entitled to recover for the reason that we do not allege performance of the terms of the contract on our part. The rule is not applicable in a case of this kind, but even if it were, we have fully complied with it in every respect. The contract is attached to the complaint and its terms are clear. The only condition to be performed by us *is to pay for the bridge.* We have alleged and proved performance of this condition.

Respectfully submitted,

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